



## STAFF REPORT

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**To:** Gallatin County Consolidated Board of Adjustment

**From:** Amy Waring, Code Compliance Specialist

**Subject:** Scott and Bryan Warwood Appeal of a Nonconforming Parcel Determination

**Hearing Date:** August 19, 2008 at 3:00 pm

**Location:** Gallatin County Courthouse – Community Room  
311 W. Main, Bozeman, MT

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### BACKGROUND

On November 16, 2007, Scott and Bryan Warwood became the record owners of 40-acre tracts within the Reese Creek Zoning District. The parcels were created through a court ordered partition action, and do not conform to the minimum lot size for the District in which they are located, which is Agricultural and Rural Residential (AR)-80. The AR-80 allows one single family residence per 80 acres as a principal use and allows for additional development rights, when the property is subdivided in accordance with cluster subdivision provisions in the Reese Creek Zoning Regulations, which were adopted on June 21, 2006.

On March 17, 2008, appellants Scott and Bryan Warwood submitted a request for a non-conforming use determination to Gallatin County in accordance with Section 5.02.7 of the Reese Creek Zoning Regulation, specifically requesting a determination of whether or not the parcels have development rights. **Exhibit A.**

Section 5.02.7 states, “It shall be the responsibility of the Zoning Enforcement Agent and Code Compliance Specialist to determine the status of non-conforming land uses and structures...”

In their request, the appellants state that the issue of the development right hinges on whether one believes the parcels came into existence at the time of Gladys Warwood’s passing pursuant to the provisions contained and set forth in her will, which predates zoning, OR whether the parcels came into existence through the actual partition and conveyance by deed to the heirs, which occurred after the zoning was in place.

The appellants take the position that their lots were created by operation of law at Gladys Warwood's passing in 2002, and that but for the administrative and judicial process that was necessitated thereafter, these lots existed prior to adoption of zoning.

The appellants also argue that the definitions of "lot of record" and "tract of record" in the Reese Creek Zoning Regulations do not require that the lot or tract exist, or be of record prior to adoption of the Zoning Regulations. Other language throughout the zoning document suggests that lots or tracts of record must exist at the adoption of the Zoning Regulations. However, they allege that the definitional section controls.

The appellants maintain that they have development rights on their parcels because they were in essence created prior to the adoption of the Reese Creek Zoning Regulations by operation of law, or alternatively that the zoning definitions of "lot of record" and "tract of record" do not require the lot/tract to predate zoning.

## COMPLIANCE FINDINGS

1. Gladys Warwood (Scott and Bryan Warwood's grandmother) died in 2002.
2. The Reese Creek Zoning Regulations and map were adopted on June 21, 2006.
3. The Gladys Warwood estate was still in the process of being probated when the Reese Creek Zoning Regulations were adopted. At that time, there was no division of land on the 238-acre parcel.
4. On November 16, 2007, Certificate of Survey 2650 was filed at the Clerk and Recorder's office as the result of a court ordered partition action. Scott Warwood is the record owner of Tract D and Bryan Warwood is the record owner of Tract B.
5. Tract B and D of COS 2650 are located in the NE ¼ and NW ¼, of Section 14, Township 2 North, Range 5 East, PMM, Gallatin County, Montana. The tracts are located in AR-80 District of the Reese Creek Zoning District.
6. Section 2.02 of the Reese Creek Zoning Regulations defines allowable uses and development rights in the Agricultural and Rural Residential (AR)-80 District. The AR-80 District provides for one single family dwelling per 80 acres with additional development rights available through cluster subdivision provisions as described in Section 4.01. **Exhibit B.**
7. The District Court did not assign development rights to any of the parcels when it approved the partition action in 2007. **Exhibit C.**
8. Collectively, the Warwood tracts in COS 2650 are adjacent to an area zoned AR-40 (one single family dwelling per 40 acres as a principal use). Section 5.07 allows for, and provides a process to amend the boundaries of the zoning map whenever the public

health, safety and general welfare require such an amendment. Scott and Bryan Warwood have not applied for a zone map amendment.

9. On June 25, 2008, appellants sent a letter to members of the Board of Adjustment regarding their appeal. This letter is attached as **Exhibit D** for the public record. This letter appears to be fragmented and appellants included a complete copy of this letter as Exhibit B to their appeal (Exhibit F in this staff report).
10. Pursuant to MCA Section 76-2-223(a) and Section 5.08 of the Reese Creek Zoning Regulations, the Gallatin County Consolidated Board of Adjustment (BOA) shall hear and decide appeals where it is alleged there is an error made by an administrative official, and it is the BOA's duty to reverse or affirm, wholly or partly, or modify the June 10, 2008 decision by the Code Compliance Specialist. Pursuant to MCA Section 76-2-224, the concurring vote of three members of the BOA is necessary to reverse the June 10, 2008 decision.

## **COMPLIANCE DECISION and APPEAL**

11. **Decision:** On June 10, 2008, the Code Compliance Specialist determined that Scott and Bryan Warwood do not have a development right on their parcels in the Reese Creek Zoning District. They may not build a residence (and associated permitted/conditional uses) on the parcels, as the lots were legally created after adoption of the Reese Creek Zoning Regulation, and do not meet the minimum lot size for AR-80 zoning. **Exhibit E.**
12. **Appeal:** On June 27, 2008, Scott and Bryan Warwood appealed the Code Compliance Specialist's June 10, 2008 determination that they do not have development rights. **Exhibit F.**

Appellants allege that they have vested development rights by operation of law, and because the definitions of "lot of record" and "tract of record" in the Reese Creek Zoning Regulation do not require lots/tracts to be created prior to adoption of zoning and that the BOA should apply the definition section.

They also maintain that this situation is an extremely isolated incident that will not establish precedent allowing others to seek relief or create parcels in contravention of the specific provisions of Reese Creek or other zoning ordinances.

The rationale for the Code Compliance Specialist's decision and response to the appeal arguments follow.

## **Rationale for Decision**

13. The Code Compliance Specialist reviewed Section 5.02 of the Reese Creek Zoning Regulation for compliance with Non-Conforming Lots, Uses and Structures.

**A. Section 5.02.1 Intent.** The regulation states, “Nonconforming uses are declared by these Regulations to be incompatible with permitted uses in the district involved. However to avoid undue hardship, nothing in these Regulations shall be deemed to require a change in plans, construction or designated use of any building on which actual construction lawfully began prior to the effective date of adoption or amendment to these Regulations, and which actual construction has been carried on diligently.”

Compliance Decision: Appellants do not meet the requirement specified in Section 5.02.1. They do not have a vested right to construct a dwelling because they did not have dwellings under construction at the time the Reese Creek Zoning Regulations were adopted on June 21, 2006.

**B. Section 5.02.2 Non-Conforming Parcels of Record.** The regulation states, “In any District, structures permitted in said district may be erected on any non-conforming parcel *which was of record on the effective date of these Regulations.*”

Compliance Decision: Appellants do not meet the requirement specified in Section 5.02.2. Their parcels became legal tracts of record in 2007 through a partition action and subsequent filing of legal descriptions at the County Clerk and Recorder’s Office, approximately one year and five months after the zoning regulation was approved. The parcels did not exist prior to 2007, and prior to adoption of the Reese Creek Zoning Regulation. There was no map, no legal description, and no division of land prior to adoption of the zoning regulations.

**C. Section 5.02.7 Determination of Status of Non-Conforming Land Uses and Structures.** The regulation provides that the Code Compliance Specialist and Zoning Enforcement Agent may determine the status of non-conforming land uses and structures based on applicable criteria in the Reese Creek Zoning Regulations, and it is the burden of the applicant to prove entitlement for approved non-conforming status, including but not limited to septic permits, building permits, business licenses, knowledge of past history of the site, and dated photographs.

Compliance Decision: Appellants did not submit a preponderance of supporting information proving entitlement to an approved non-conforming use. They did not submit Gladys Warwood’s will, nor did they submit any surveys, maps, court documents, or any other information to support an approved non-conforming status determination. Rather, they engaged in a philosophical debate over operation of law, and whether there was a development right associated with previously unrecorded parcels just because a will allegedly left some interest to heirs. The appellants did not submit a preponderance

of information proving entitlement to an approved non-conforming use because the information did not exist.

14. The Code Compliance Specialist reviewed the Reese Creek Zoning definitions in Section 6 for “lot of record” and “tract of record” with respect to Section 2.02.2 Tracts of Record in the AR-80 District, Section 5.02.2 Non-conforming Parcels of Record, and the definition of Non-Conforming Parcel (Section 6, p. 74 of the Zoning Regulations).

A. Lot of Record:

“A lot which is part of a subdivision recorded in the office of the County Clerk and Recorder, or a lot described by metes and bounds, a copy of which has been recorded in the office of the Clerk and Recorder.”

B. Tract of Record:

“An individual parcel of land irrespective of ownership than can be identified by legal description and is independent of any other parcel of land, using documents on file in the records of the County Clerk and Recorder’s Office.”

C. Non-Conforming Parcel:

A parcel, the area, dimensions or location of which was lawful prior to the adoption, revision, or amendment of a zoning regulation but fails by reason of such adoption, revision or amendment to conform to the present requirements of the zoning regulation.

D. Tracts of Record (Section 2.02.2 in the AR-80 District)

All legal tracts of land on record with the Office of the Clerk and Recorder *at adoption of these Regulations*, regardless of size, are entitled to all the uses by right (principal uses) and conditional uses of the AR-80 District designation with an approved Conditional Use Permit (CUP).”

E. Non-Conforming Parcels of Record (Section 5.02.2).

The regulation states, “In any District, structures permitted in said district may be erected on any non-conforming parcel *which was of record on the effective date of these Regulations*.”

Appellants allege that the definitions of “lot of record” and “tract of record” do not require that a lot or tract exist or be of record as of the date of adoption of the Reese Creek Zoning Regulation in order to be recognized (last paragraph of p.2 of appeal). Appellants note that these definitions do not require that the two tracts/lots exist as of the enactment or adoption of the zoning ordinance. Appellants suggest that the definitional sections controls and they dismiss other language in the zoning regulations that require a lot or tract of record to exist at the time of adoption of zoning.

Compliance Decision: The Code Compliance Specialist concurs with appellants that the Warwood tracts are currently a lot or tract of record as defined by the Reese Creek Zoning Regulation. They became legal tracts of record on November 16, 2007 with the

filing COS 2650 at the Clerk and Recorder's Office, approximately one year and five months after zoning was adopted.

However, the Warwood tracts do not meet the definition of a non-conforming parcel, nor do they meet Sections 2.02.2 and 5.02.2 because the lots were not legal tracts of record prior to adoption of the zoning regulations. There was no legal description, no division of land, no Certificate of Survey or any other map identifying the tracts. They are not a non-conforming parcel.

Appellants rely on the definitions "lot of record" and "tract of record" but fail to consider the non-conforming status of a parcel, which is contingent on the creation date (before or after June 21, 2006). It is highly plausible that additional lots/tracts will continue to be created in the Reese Creek Zoning District through lawful subdivision or exemption processes that comply with underlying zoning. The Reese Creek Zoning Regulations do not preclude additional divisions of land.

In order for a "lot of record" or a "tract of record" to be classified as a "non-conforming parcel" and also comply with Sections 2.02.2 and 5.02.2, the tract had to be created prior to June 21, 2006. The Warwoods failed to obtain nonconforming status. Furthermore, since the Warwoods do not have nonconforming parcels, all they have is a "lot of record" or "tract of record" that does not comply with the Reese Creek Zoning Regulations because the size of the parcels is too small. Therefore, the tracts are not vested with or entitled to principal and conditional uses allowed in the AR-80 District.

#### 15. **Operation of Law**

Appellants allege that the Code Compliance Specialist misapplied the principal of transfer by "operation of law." They state, "Transfers that occur by operation of law are those transfers which occur automatically and without the necessity for further or future administrative filing to be binding and valid...For example, if a husband and wife hold property as joint tenants with right of survivorship, the interest of a decedent spouse passes, conveys and transfers to the surviving spouse automatically by operation of law upon the death of a spouse."

Appellants ascertain that Scott and Bryan Warwood's lots were created by operation of law at Gladys Warwood's passing in 2002.

Compliance Decision: Appellants did not provide a copy of Gladys Warwood's will or other supplementary information to support a non-conforming parcel decision based on operation of law. Pursuant to Section 5.02.7 of the Reese Creek Zoning Regulations, it is the burden of the applicant to prove entitlement for approved non-conforming status.

In the June 10, 2008 decision, the Code Compliance Specialist stated that the definitions of "lot of record" and "tract of record" in the Reese Creek Zoning Regulation are very clear that a lot/tract of record must have a legal description on file at the Clerk and Recorder's Office. Additionally, Section 5.02.2 and the definition of a nonconforming

parcel are very clear that an approved nonconforming parcel must be of record on the effective date of these Regulations. The Code Compliance Specialist concluded that the contemplation of lots in Gladys Warwood's will did not create legal tracts of record. The Warwood's tracts did not become legal tracts of record until legal descriptions were filed at the Clerk and Recorder's Office on November 16, 2007, approximately one year and five months after zoning was approved on June 21, 2006. Therefore, the parcels are not an approved non-conforming parcel of land.

Upon appeal, the Code Compliance Specialist obtained public records regarding the dispositions of Gladys Warwood's estate available at the Clerk of District Court to examine the issue of creation of lots by operation of law in more detail. The review of these records only solidified the original decision, and gave showed no cause to revoke, rescind, or change the decision in any way.

- A. Gladys Warwood passed away on February 23, 2002. In her will, she left her property to her "children living at my death in equal shares, provided, however, that if either of my children shall predecease me and leave issue of his body, then such share that such child would have taken shall go to his issue in equal shares." **Exhibit G.**
- B. Gladys had two sons, John (living) and Robert (deceased). Robert Warwood has three children (Scott Warwood, Bryan Warwood, and Dana Doney), and was married to Nettie Warwood.
- C. Based upon A and B above, 50% interest in the property went to John Warwood, and the other 50% interest should have been equally split between Scott, Bryan and Dana, i.e, the "issue" of Robert who was deceased. Nettie, the spouse, is not an "issue." Nonetheless, the will did not show any maps or division of land splitting the property. At most, it conveyed an interest in the property, and that could plausibly be as joint tenants in common.
- D. The property was originally held by the Gladys Warwood Amended Family Limited Partnership. On or around October 18, 2006 (after zoning was adopted), this partnership was dissolved (pursuant to a Consent to Dissolve the Limited Partnership, dated October 18, 2006). As a result of the dissolution of the Family Partnership, the following heirs and relatives were entitled to own undivided interests: John and Barbara Warwood (husband and wife), Scott Warwood, Bryan Warwood, Dana Doney and Nettie Warwood.
- E. On October 23, 2006 (after zoning), John and Barbara Warwood, Scott Warwood, Bryan Warwood, Dana Doney and Nettie Warwood filed a joint petition in District Court to partition real property in the Gladys Warwood Estate, with disposition of tracts into five parcels into its current configuration. This is the first time there is a proposed division of land available for review. **Exhibit H.**
- F. On October 30, 2006, the District Court provided notice to the Gallatin County Commissioners regarding the pending division of land proposed in the Warwood

partition action, and the County Commissioners provided a written response on November 30, 2006. **Exhibit I.**

In this letter, Chairman John Vincent states that the pending partition is not an attempt to evade Subdivision Regulations; however, the parties will not be able to exercise five development rights under the existing proposal due to the location of the subject property in the AR-80 District of the Reese Creek Zoning District. Chairman Vincent goes on to say that the Planning Department (Victoria Drummond) met with the affected parties on October 5, 2006 and discussed how the property could be divided in accordance with the Reese Creek Zoning Regulations. At that time, Ms. Drummond advised all of the Warwoods and Dana Doney that development rights could be assigned to each parcel, only if they were clustered pursuant to Section 2.02 of the Reese Creek Zoning Regulations.

Chairman Vincent requested that the court assign three development rights, and to include a note on the survey describing which parcels have development rights, and which do not.

- G. On December 15, 2006, John and Barbara Warwood submitted a letter to the District Court stating that they do not want to relinquish their development rights to his brother's heirs, and that they already agreed to let Bob's (Robert's) heirs have an additional 30 acres in order to speed the estate process. **Exhibit J.**
- H. On September 28, 2007, the District Court approved an "Order to Partition Real Property" dividing the Gladys Warwood estate into parcels described as A through E on COS 2650. In this Order, the Court states that it elects not to assign zoning development rights to the parcels, pursuant to an existing zoning district, as the Court finds that it has no jurisdiction to do so under § 72-3-914 or § 72-3-201 MCA and elects to grant the request for partition without referencing zoning development rights, without prejudice to either party if an issue of zoning development rights arises in the future." **Exhibit C.**
- I. On November 16, 2007, Certificate of Survey (COS) 2650 was filed at the Gallatin County Clerk and Records Office, creating five tracts of record designated as A through E. Clerk & Recorder Doc. # 2284648. **Exhibit K.**

Tract A	John & Barbara Warwood	100.00 acres
Tract B	Bryan Warwood	40.00 acres
Tract C	Dana Doney	40.00 acres
Tract D	Scott Warwood	40.00 acres
Tract E	Nettie Warwood	18.09 acres

COS 2650 indicates that the tracts were created by a court order (Cause No. DP-02-44B) for the Gladys E. Warwood Family Limited Partnership (John and Barbara Warwood, Scott Warwood, Bryan Warwood, Dana Doney and Nettie Warwood).



This partition does not appear to strictly adhere to Gladys Warwood's will, which gave 50% interest to John, and the remaining 50% split evenly between the three children (Scott, Bryan, and Dana). Rather, it appears to be a possible settlement agreement to close the estate as referenced in John Warwood's letter in G above.

The Code Compliance Specialist finds the argument that the appellant's parcels were created by operation of law at Gladys Warwood's passing in 2002 to be unpersuasive. It is acknowledged that Scott and Bryan had a vested interest in the land. However, the resulting division of land was not established at the time of Gladys death, nor was it established until five years after her death and over one year after enactment of the Reese Creek Zoning Regulations.

The Code Compliance Specialist also finds appellants example in their appeal regarding conveyance of property from a decedent spouse to a surviving spouse to be overly simplistic and without direct comparison (2<sup>nd</sup> paragraph on p. 2). In their example, there is only one heir and no additional divisions of land. The Warwood partition action conveyed and split property into five parcels. Gladys Warwood's will only conveyed an interest in the land; it did not contemplate or identify a division of land. There was no map, no survey, and no division at the time of her death.

#### 16. **Precedence**

Appellants allege that this is an extremely isolated incident that will not establish a precedent allowing other to seek relief or create parcels in contravention of the specific provision of Reese Creek or any other Zoning Ordinance.

**Compliance Response:** Each investigation and decision is fact specific to the particulars of any given case. In this instance, the decision was made with respect to a nonconforming parcel determination for Scott and Bryan Warwood. However, the same facts are present surrounding the creation of the tracts for Dana Doney (40 acres) and Nettie Warwood (18 acres). Thus, two additional parcels are affected by this decision.

### **STAFF SUGGESTED ACTION**

The Gallatin County Consolidated Board of Adjustment, after hearing and considering all public testimony, must determine if the June 10, 2008 decision by the Code Compliance Specialist was made in error, and either affirm, modify, or reverse the decision.

The reasons to support a decision to affirm the Code Compliance Specialist's decision include, but are not limited to:

1. Evidence shows that there was no survey, map, or division of land at the time of Gladys Warwood's death in 2002. The will only conveyed an interest in the property.
2. The Reese Creek Zoning Regulations were adopted on June 21, 2006.
3. The District Court approved the partition action on September 28, 2007.

4. COS 2650 was filed at the Clerk and Records Office on November 16, 2007.
5. Scott and Bryan Warwood do not have legitimate non-conforming parcels, as the tracts were legally created approximately one year and five months after adoption of the Reese Creek Zoning Regulations.
6. Since the lots are not approved non-conforming parcels, and they do not meet the minimum lot size, Scott and Bryan Warwood do not have a vested interest, nor are they entitled to a development right for their parcels in the AR-80 District.